United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ Affidavit of Mailing

75-1236

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P/S

To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1236

UNITED STATES OF AMERICA,
Appellee,

—against—

ROSAURA MUNOZ DE GARCIA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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LEE A. ADLERSTEIN,
Assistant United States Attorneys
Of Counsel.

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BRIEF FOR THE APPELLEE

Preliminary Statement

Rosaura Munoz de Garcia appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*) entered June 20, 1975, following a jury trial, convicting her of importing cocaine into the United States and possessing cocaine with intent to distribute the same, in violation of Title 21, United States Code, sections 952(a) and 841(a)(1) respectively. Appellant was sentenced to a term of five years imprisonment and a special parole term of five years on each of the two counts for which she was convicted, such sentences to run concurrently. Appellant was sentenced pursuant to Title 18, United States Code, section 4208(a)(2); appellant is presently incarcerated pursuant to her sentence.

On this appeal, appellant contends that the trial judge improperly denied her motion for a new trial, the Govern-

ment having "suppressed" evidence which would have been helpful to appellant's defense. Appellant further argues that the trial judge improperly refused to pose, to prospective jurors at the time of jury selection, four questions requested by the defense.

Statement of the Case

A. Introduction and Summary

On November 16, 1972 the appellant, a Colombian national and permanent resident of the United States, arrived at John F. Kennedy Airport on a flight from Santiago, Chile to New York City. The United States customs inspector who inspected appellant's luggage determined that there was a substance hidden in two suitcases; this substance was found to be a large quantity of cocaine.[1] Appellant was arrested at the airport and stated to customs inspectors that the suitcases had been left at her home in Queens, New York by a woman hardly known to appellant. Further, appellant stated that she was unaware of any cocaine in either suitcase.

Appellant was arraigned before a United States Magistrate on November 17, 1972 and was indicted by the grand jury on December 7, 1972. A three count indictment was filed charging appellant with cocaine importation, possession of cocaine with intent to distribute the substance, and failure to manifest a substance on board an airplane, Title

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[1] Appellant was indicted for the importation and possession of 4,519 grams (approximately 10 pounds) of cocaine. During the early stages of the trial it was discovered that one side of one of the suitcases had as yet not been opened by Government agents and that a concealed substance was present. The substance was subsequently determined to be approximately three additional pounds of cocaine.

21, United States Code, Sections 952(a), 841(a)(1), and 960(a)(2) respectively.[2]

At the trial the Government presented evidence showing how cocaine was found in defendant's suitcases. Appellant and her daughter testified that appellant did not know of the existence of the cocaine.

B. Selection of the Jury

Defense counsel, Philip Peltz, requested that the trial Judge ask each prospective juror the following questions:

1. How much education do you have?

2. What schools did you attend?

3. Have you been in the Armed Forces? How long? Where?

4. Do you own or rent your home?

5. Have you read anything in any newspaper or magazine which would in any way prejudice you against the woman who is the accused in this case?

6. Do you have any bias, prejudice or preconceived ideas of any kind which would disable you from sitting fairly as a juror in this case where the defendant is charged with importation of ten pounds of cocaine?

7. Have you any personal feelings about the subject matter of this case which would interfere with your sitting fairly and impartially?

8. If the defendant should elect to testify in her own defense, she will do so with the aid of Mr. Baron-Boyne, Spanish interpreter—will this in any way prejudice you?

9. What is your prior jury experience?

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[2] The count pursuant to section 960(a)(2) was dismissed by the Court at the request of the prosecutor at the beginning of the trial.

The trial judge stated, prior to jury selection, that he would not ask the first four questions (5).[3] The judge stated, however, that he would ask the remainder of the questions that had been requested, including a question on possible bias in drug matters and possible prejudice against a defendant who might testify through a Spanish interpreter. The trial judge stated that sufficient information about the background of a prospective juror would be elicited adequately through questions on the occupation of each prospective juror. The Court, in addition, repeated throughout the jury selection the following question:

> [I]f a Drug Enforcement agent were to testify in this case would you consider his testimony the same as you would any other witness who came before the court?

C. The Government's Case

Howard Swinimer, the United States Customs Agent who initially examined appellant's luggage, testified that he had become suspicious of appellant's suitcases because of the feel and thickness of the bottoms, the weight of the empty halves of the suitcases (16, 66), and the odor of rubber cement (17). After consultation with his supervisor, Inspector Swinimer made an incision with a knife into one of the Samsonite suitcases and found cardboard—"not usually found in the construction of this type of a Samsonite suitcase." A second incision revealed a white powdered substance (66). Appellant and her daughter, as well as the luggage, were searched further in Customs Service offices. Through Inspector Swinimer, appellant's Colombian passport, airplane tickets, and customs declaration card (showing nothing declared) were introduced into evidence (61-64).

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[3] This reference is to the first day's proceedings, May 2, 1975.

Inspector Swinimer, in addition, testified that after appellant had been given her rights, appellant stated that she had gone to Chile in order to give thanks for her daughter's cure from an illness, and that she had obtained the luggage from a woman stranger, who had stayed in appellant's apartment and left the luggage in gratitude (73-74). Other Government witnesses testified about similar statements of appellant shortly after the arrest: viz, that the suitcases were left at appellant's Queens apartment by a woman named Ana Agudelo—a woman who appellant had met neither before nor since that one short stay (100-04, 130)—and that when appellant went to Chile, she had used that luggage.

The Government established, through the testimony of Drug Enforcement Administration chemist John Boyd, that 4,529 grams of cocaine had been found in appellant's suitcases and that such cocaine was 94 percent pure. Lastly, Drug Enforcement Administration Agent Gerald Whitmore testified that the cocaine found in appellant's luggage was worth "approximately between forty-five and fifty thousand dollars at the imported wholesale price at the airport [in November 1972]." (146-47).

D. The Defense Case

Both the defendant and her daughter, Yolanda, testified on direct examination that the purpose of the August, 1972 trip by appellant and three of her children to Chile was for medical care for the youngest daughter (207, 243). The family came back in early September because it had run out of money (209-10). A woman named Ana Agudelo appeared at the Garcia apartment in Queens and was sheltered by appellant for two days even though the woman was a complete stranger to the Garcia family (256). Ana Agudelo left behind two empty suitcases and appellant did not know, until her arrest, that they contained cocaine (258). Appellant elected to use the suit-

cases on her trip with the youngest daughter to Chile, which trip was for the purpose of bringing the young daughter to a doctor in Chile who had been recommended by a co-worker of appellant (248-49). Appellant never was able to visit the doctor with her daughter because of a physician's strike in Santiago (249-50).

Cross examination revealed the weakness of appellant's story. Appellant testified that one reason for her return to New York from Colombia in early September was to be with her children when they re-entered school (295). Despite her children's need for her or the family's difficult financial situation (appellant testified that she was on welfare at the time of these trips), appellant made a second trip on November 1, 1972—this time to Chile (295). Plane fare for the Chile trip was $844 (215-16).

Appellant further testified on cross examination that Ana Agudelo had been given the bedroom of appellant's son to sleep in, despite the fact that it was then necessary for three children and appellant's mother to sleep in a living room, another child to sleep in a dining room, and for two children to sleep with appellant in her own room (278-79). When Ana Agudelo arrived at the Garcia apartment the Agudelo luggage had been filled with clothes (280). When Ana Agudelo left the apartment leaving behind empty suitcases, these clothes, including shoes, were carried out wrapped in a coat (281). Appellant decided to use the luggage on the trip to Chile despite the fact that Ana Agudelo had complained of lack of money, and despite the fact that appellant thought the suitcases to be perhaps Ana Agudelo's most valuable possessions (283-87).

Appellant stated that she had taken her daughter to Chile without having written the recommended doctor and without having called to make an appointment (300). In

fact, the woman who had recommended the doctor to appellant had never personally met the doctor and did not know if he was still in practice (298-300). Appellant never saw the doctor in Santiago though she stayed there for two weeks. Santiago was a city containing no friends or relatives of appellant (301). When appellant left for Chile she thought she would need to stay for 3 or 4 weeks (303); she had to stay in a hotel (304). Lastly, appellant did not know how a Samsonite name tag with her name on it came to be attached to the luggage (275).

E. The Defense Motion for a New Trial

After the jury returned a guilty verdict on the two outstanding counts of the indictment, defendant moved, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for an order vacating the judgment of conviction and for a new trial. In an affidavit supporting this defense motion, defense counsel stated:

> It is alleged that on March 5, 1975 agents of the Government discovered an additional three (3) pounds of cocaine [aside from the ten pounds on which the case was prosecuted] secreted in the suitcases. This new evidence was never disclosed to defendant or her counsel and was in fact suppressed. (Appellant's Appendix at 63-a).

The Government, in its responding papers, pointed out that the Assistant United States Attorney who tried the case had stated in open court, at an early stage of the trial:

> One other thing I would like to call your Honor's attention to is the fact that in one of the suitcases there very well may be some cocaine still there in one of the secret compartments of the suitcase. I just wanted to call it to the Court's attention (41).

In addition, the Government filed an affidavit of United States Special Customs Agent John Fish, which affidavit stated that a defense expert had examined both of appellant's suitcases, prior to trial, at the United States Customs House. (See appellant's appendix, at 71-a).

The Rule 33 motion was argued before Judge Bramwell on August 1, 1975. Mr. Adlerstein, the Assistant United States Attorney who prosecuted the case stated that his informing the court with respect to possible additional cocaine had come "shortly after I was informed there might have been more cocaine in the suitcases." (See appellant's appendix at 78-a). At the argument, the trial Judge found that the crucial point to consider was that ten pounds of cocaine had been discovered by the Government, not that three additional pounds of the substance had remained in one of the suitcases:

> Whether the defendant knew it was 10 pounds or 13 pounds, I do not think there would have been any change as to what their position would be or what the jury did with it. I do not see any way it would have changed [the outcome]. (Appellant's appendix at 81-81a).

ARGUMENT

POINT I

The Additional Cocaine was not Suppressed by the Government; nor was it "Brady" material or Evidence Requiring a New Trial.

The record of the trial reveals no withholding by the Government from the defense of any discoverable material or any evidence that may have been helpful to the defense. The Assistant United States Attorney who prosecuted the case had made both suitcases available for inspection by the defense well in advance of trial; the luggage was inspected by a defense expert. In addition, the same Assistant United States Attorney stated on the record at an early stage of the trial that more cocaine might have remained in one of the suitcases. The Government submits that a review of the record of the trial reveals an openness in the Government's case, and no disposition on the part of the Government to take unfair advantage of the defendant at any stage of the proceeding.

The Government submits that the fact that three pounds of cocaine was left in one of the suitcases is irrelevant to the question of appellant's knowledge of the cocaine she imported. The overriding fact for the jury to consider was that Inspector Swinimer was able to detect a substantial quantity of cocaine and that appellant had, at the time of her arrival in the United States, the entire quantity of cocaine in both sides of both suitcases and not merely three pounds of the substance in one side of one suitcase. The question for the jury was the likelihood of appellant's knowledge of *the* cocaine in her luggage, not specific knowledge of any particular part or amount of the substance. The government fails to see how evidence

of the additional three pounds—approximately $15,000 worth of additional cocaine at the wholesale value testified to by Agent Whitmore—would have been anything but additional compelling evidence *against* appellant.

The Government submits, therefore, that the existence of the additional cocaine was not evidence favorable to the accused or "relevant either to guilt or punishment." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). This cocaine was not evidence "of such a character that it would probably produce a different verdict in the event of a retrial," *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *De Sapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972), and the denial of defendant's Rule 33 motion by the trial judge was not "wholly unsupported by evidence," *United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946); *United States* v. *Silverman*, 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). The Government would call the attention of this Court to the testimony of the appellant at the trial and the Government submits that appellant's explanation for how the suitcases came into her possession and the reasons given for the trip to Chile were explanations unsupportable in logic and inherently incredible. This case, like *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), was one in which "proof of guilt was clear and convincing [and] the verdict was ensured by the defendant's words. . . ."

POINT II

Judge Bramwell did not Abuse his Discretion in Refusing to Ask Prospective Jurors Four Questions Requested by the Defense.

It is black letter law that a trial judge "enjoys wide discretion in conducting the/jury/voir dire. . . ." *United States* v. *Zane*, 495 F.2d 683, 693 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Ruggiero*, 472 F.2d 599, 606-07 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Rule 24(a), Federal Rules of Criminal Procedure. The record in the instant case discloses that Judge Bramwell carefully questioned each prospective juror on possible prejudices each person might have had against defendants in drug cases. While the United States Supreme Court long ago held that a defendant had a right to have jurors questioned on a critical matter such as racial prejudice, *Aldridge* v. *United States*, 283 U.S. 308 (1931), the Court has kept trial Court discretion wide by recently holding that a defendant has no right to a question on religious beliefs, at least in a case involving obscenity. *Hamling* v. *United States*, 418 U.S. 87 (1974); see also *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Appellant has been unable to show a special need for the questions requested by her attorneys greater than the need shown in *Hamling*. See also *United States* v. *Zane*, *supra* (trial judge need not ask in voir dire how prospective jurors view business fraud); *United States* v. *Ruggiero*, *supra* (trial judge need not ask, in a perjury case, whether prospective jurors had previously served on a jury); *United States* v. *Bowe*, 360 F.2d 1, 9 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966) (trial judge need not ask prospective jurors on their possible membership in specific organizations thought to be racially prejudiced).

If defense counsel wished to have a picture of the background of prospective witnesses, a sufficiently clear picture was attainable—as Judge Bramwell stated—through a question on each prospective juror's occupation. The fact that Judge Bramwell guarded the rights of appellant during jury questioning is reflected by the question asked by the judge on the view of every juror toward Government agents as witnesses in comparison to other witnesses. Judge Bramwell accepted only those on the panel who stated that they viewed Government agents as being no different than other witnesses. In the entire context of the proceeding the use of discretion by the trial judge was proper and should be upheld.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 3, 1975

Respectfully submitted,

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LEE A. ADLERSTEIN,
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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of November 1975 he served ~~a~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Philip Peltz, Esq.
32 Court St.
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
3rd day of November 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977